SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 335

THE HANOVER SHOE, INC.,
Petitioner,

v.

UNITED SHOE MACHINERY CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER THE HANOVER SHOE, INC.

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The Hanover Shoe, Inc. (hereinafter Hanover), plaintiff below and petitioner herein, submits this reply to the brief dated December 22, 1967 (hereinafter Un. Br. No. 335) submitted by United Shoe Machinery Corporation (hereinafter United), defendant below and respondent herein. The brief for petitioner Hanover filed November 24, 1967 will be referred to hereinafter as Han. Br. No. 335.

I.

Reply to United's arguments as to "The Tax Advantages of Leasing," Un. Br. No. 335, 5-12.

A. There are no "tax advantages" to leasing.

Leasing has no tax advantages over ownership. Under our tax laws, lease payments are fully deductible as rent paid and ownership costs are fully deductible as depreciation, repair and maintenance expense, and interest paid on money borrowed to buy.*

If there are benefits or advantages in ownership as against leasing or leasing as against ownership, they must be found outside our tax laws. That is where Hanover found them when it had the chance.** The Court of Appeals was quite wrong in seemingly supposing that our tax laws favored one over the other.*** United in its brief points

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* These items are the components of ownership cost utilized by the District Court in computing the damage of $1,413,203. *See* A. 81-82, 92; 245 F. Supp. at 287-288, 292. Of course "ownership cost" is quite distinct from "purchase price."

** See Han. Br. No. 335 fn.*, 12-13. Hanover's first chance to buy United's lease-only machines came when the final decree in the Government case became effective on June 1, 1955. Nothing in the record shows that tax considerations played a part in Hanover's decision to buy over $500,000 worth of United machines shortly thereafter.

*** Thus, the Court of Appeals refers to "whatever tax advantages Hanover obtained by the leasing system," (A. 213) 377 F. 2d at 792; to "the benefit of tax deductions for the rental and royalty payments" that it would have lost if it had owned the machinery, *ibid.*, in disregard of the deductions available for an owner; to "the tax advantages it received under the leasing system," *ibid.*; to "the favorable tax consequences which Hanover obtained from leasing and the unfavorable consequences which would have flowed from ownership," (A. 215) 377 F. 2d at 792-793.

The Court of Appeals was also quite wrong in its reference to a capital gains tax on the sale of owned machines at more than depreciated book value, (A. 214-215) 377 F. 2d at 792. All statements about ownership are necessarily hypothetical because Hanover was deprived of the possibility of ownership. Consequently there is no evidence that, if Hanover were an owner, it would have sold any of its machines or sold any at more than depreciated book value.

to nothing to support its claim that our tax law produces benefits for leasing as against ownership. United's pose as a benevolent monopolist showering mysterious tax benefits* upon its captive lessees is a pretentious fabrication.

In Hanover's case, the District Court fixed the dollar amount of Hanover's injury, through being compelled to lease and without regard to tax consequences, at $1,413,203 during the statutory period. This figure is the actual excess payment Hanover would not have had to pay except for United's monopolization. It is the amount United unlawfully took from Hanover. That is Hanover's case.

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* United does no more than reiterate "tax saving" "actual tax benefits" Un. Br. No. 335, 2; the "tax advantages of leasing," *id.* at 5; the "net tax benefits of leasing," *id.* at 8; the "tax advantages of leasing," *id.* at 11.

The example proffered by United, Un. Br. No. 335, 6, apparently to show that tax consequences favor leasing, is obscure and meaningless.

What is the "before-tax purchase cost of $100" that is compared with an "annual before-tax leasing cost of $160?" The lease cost is said to be "annual." The "purchase cost" is not, yet they are compared as though they were. A "purchase" is scarely annual and it is ludicrous to present an example of a machine that rents for $160 a year yet can be purchased for only $100! Over ten years the rent would be $1,600 yet "purchase cost" is said to be $100! As we have shown above, both leasing and ownership costs are 100% deductible. If the "purchase cost" is meant to be not the original purchase price but the annual ownership cost to be compared with the annual lease cost, then, both items—$160 and $100—are deductible each year. Assuming a 50% tax rate, as United does in reducing the "actual leasing cost" from $160 to $80 a year, the annual ownership cost becomes $50, not $90 as United states. [With annual ownership cost of $100 being fully deductible it is inconceivable that Hanover would deduct only $10 each year, as United implies.] It follows, Hanover submits, that since the lease cost of $160 exceeded the ownership cost of $100 by $60, this excess is quite properly the damage figure.

B. There is nothing unique about Hanover's case or its claim for damages.

There is nothing unique about Hanover's case, as United seems to claim.* The Court of Appeals did not treat it as unique. United no doubt makes the point to avoid asking this Court to adopt an after-tax rule of damages for general application.

There is nothing unique about calculating damages by comparing ownership costs with leasing costs when what is sought is a determination of the extent of the damage suffered by a victim who wanted to own machinery and was prevented from doing so by the exclusionary practices and policies of a monopolist. Building on the finding that Hanover would have purchased if it could, the Court of Appeals then assumed, as does United's argument, and wholly without support in the record, that availability of a choice must be attributed to Hanover during the damage period. As we pointed out in our main brief, Hanover had no choice, Han. Br. No. 335, 12. Choice, we submit, requires alternatives, each of which may be freely selected. The basis of United's liability is that, as a monopolist, United denied choice.**

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* United tries to limit the holding of the Court of Appeals in United's statements that "It is the unusual nature of the claimed injury and damages * * * which necessitates consideration of all factors, including the effect of Federal and state income tax deductions * * *", Un. Br. No. 335, 9; and, further, "But few if any cases would involve the novel theory of damages urged here * * *," *id.* at 11, fn. 7.

** United makes the wholly erroneous argument that "the asserted basis for United's liability" is that Hanover would have chosen to buy rather than lease the machinery, Un. Br. No. 335, 5. That is not correct. Hanover's "basis" is monopolization in violation of Section 2 of the Sherman Act through, among other matters, United's long-standing exclusionary lease-only policy that injured Hanover.

United, having fabricated a choice, and the Court of Appeals, having apparently assumed the existence of that nonexistent choice, next assume what a business man would do in making the choice.* But here we are not concerned with the variety of factors that a business man might consider when faced with the choice between buying or leasing a factory site, trucks, shoe machinery or anything else. Here the problem is how the businessman's damage is to be computed when a monopolist gives him no choice.

The entire artificial structure of argument based on choice falls to the ground when choice is eliminated as a factor in calculating damage. Choice can have no place in Hanover's case, because:

First, there was in fact no choice and no business reality (other than the denial of the right to purchase), to be considered during the damage period; and

Second, if there had been, there would be no basis for a claim of violation of law and damage. The Court of Appeals; in espousing a fiction of choice, was espousing a self-destructive argument and one that automatically abolished the possibility of damage. Choice, it seems obvious to Hanover, means freedom to choose and thus precludes damage based on monopolization that denied choice.

The basic error of the Court of Appeals is that in a calculation of damages it directed the District Court "to go beyond the first step." *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 533 (1918), Han.

* All of United's citations to business literature, etc. Un. Br. No. 335, 5-6 and to the considerations that were relevant when the final decree became effective in the Government case and shoe manufacturers in fact had a choice, Un. Br. No. 335, 7 are wholly beside the point as far as Hanover's case is concerned.

Br. No. 335, 15-20. By so doing, as we demonstrated in our main brief and also show below, it would reward the wrongdoer and penalize the victim.

United has no answer to the applicable case law on damages in antitrust cases cited by Hanover, Han. Br. No. 335, 15-20* or to Hanover's policy arguments, *id.* at 20-24. It dismisses all with its own question begging *ipse dixit* that damages are not shown until taxes have first been deducted in making the calculation. This kind of argumentation enables United, as we showed in the table in Han. Br. No. 335, 14-15, to retain some $350,000 of the $1,413,203 of excess machinery cost found by the District Court to have been received by it from Hanover, while leaving Hanover still out of pocket $350,000.

Under that approach Hanover will not recover "the damages * * * sustained",** but will be left with a substantial deficit prior to trebling, as shown in the table in Han. Br. No. 335 at 14-15. Apart from a quibble*** and

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* Of the five cases cited by United, Un. Br. No. 335, 9-10, only one relates to the calculation of damages. That was an employment contract case that involved no more than construction of an employment contract, *Beggs* v. *Dougherty Overseas, Inc.*, 287 F. 2d 80 (2d Cir. 1961). The term of employment had been negotiated with a view to assuring the employee of work abroad during the full 18 months necessary to qualify him as exempt from payment of United States income taxes on his first $20,000 of income. When the employee was wrongfully fired and went home, his employer became liable under the contract to indemnify him for the extra United States taxes it had been understood the employee would not have to pay.

The remaining cases cited in United's brief are not cases of damage calculation and have no relevance here.

** Clayton Act, 1914, c. 323, §4, 38 Stat. 731, quoted Han. Br. No. 335, 3.

*** United quarrels about the designation of the first entry as "Excess Rental Charges." The footnote defines this to mean the "excess of rental cost over free market ownership cost before tax." That is what it is and indeed it is what United suggests, Un. Br. No. 335, 10.

two wholly erroneous statements about this table,* United does not meet the main point shown in this table that, if the decision of the Court of Appeals is accepted, United will, after payment of compensatory damages, come out $350,000 ahead and Hanover will be $350,000 out of pocket.

In its answering brief United never meets this central point.

Any rule of damage law that produces this result is obviously inequitable and wrong. The error of the Court of Appeals which causes this result is in considering taxes at all in computing damage.

Damages calculated, as they were by the District Court, without considering the so-called tax advantages of leasing show that, in order to attain a just result, United should pay Hanover the full amount of $1,413,203 that

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* First, Un. Br. No. 335, 11, United erroneously states that Hanover deducted in its Table only the so-called "Excess Rental Charges" and not the whole of the lease charges. The figure of "Excess Rental Charges" is, as stated, the excess of rental cost over free market ownership cost before tax. The damage figure, rounded off, found by the District Court (A. 166) 245 F. Supp. 302, of course, takes into account the full amount of Hanover's lease payments to United, not just part of them, in arriving at Hanover's damage figure. It is absurd to suggest, as United does, Un. Br. No. 335, 10-11, that the tax effect of any amounts other than the excess amounts should be considered in the table.

Second, in footnote 5, Un. Br. No. 335, 11, United attacks the deduction of excess rental charges by distorting the decision of Judge Goodrich in the separate trial of the passing on defense. Both of Hanover's methods of calculating damage are alleged in the complaint, A. 19, i.e. its primary claim, accepted by both courts below, that Hanover was injured in being required to lease and thus deprived of the savings of ownership and its other claim, which it failed to prove, that the lease payments themselves were excessive. Both were before Judge Goodrich. The "second entry" in the table in Han. Br. No. 335, 14, is, of course, the reduction in taxes which follows from the deduction of lease charges. As noted in the preceding paragraph, Hanover would in fact deduct all lease payments, just as it would deduct all of ownership cost. In the table, however, we have stated only the excess of lease cost over ownership cost which determines the damage here.

United unlawfully exacted during the damage period. The dual objective of the law of damages is to restore the victim and the wrongdoer to the same financial position that existed before the wrongful acts. Hanover is entitled to recover each dollar wrongfully taken from it. United must disgorge each dollar so taken. The damage judgment that attains these goals is the just judgment.

The following table shows the just result that is reached under the rule of damages urged by Hanover:

HANOVER—ASSUMING 50% TAX RATE

Excess Payments		$1,400,000
Taxes Hanover saved by deducting such excess		700,000
Out of Pocket		$ 700,000
Recovery in full—the damages	$1,400,000	
Tax on Recovery	700,000	
Recovery after tax—In Pocket		700,000
In or Out of Pocket		0

UNITED—ASSUMING 50% TAX RATE

Excess Payments Received		$1,400,000
Taxes Paid thereon by United		700,000
In Pocket		$ 700,000
Recovery—Damages Paid	$1,400,000	
Taxes Saved by Deduction of Damage paid	700,000	
Out of Pocket		700,000
In or Out of Pocket		0

II.

Reply to United's arguments as to retroactive application of the final decree in the government case, Un. Br. No. 335, 12-26.

The issue as to retroactivity presented by United is whether an important item of proof—the final decree in the Government case*—in support of Hanover's claim of monopolization in violation of Section 2 may be received as prima facie proof for the full period of the statute of limitations or whether it may not serve as prima facie proof at all [this is United's first position when it argues that the final decree may be applied only prospectively from the date of the decision, Un. Br. No. 335, 12] or only from June 10, 1946, the date of the decision of this Court in *American Tobacco Co.* v. *United States,* 328 U. S. 781 [this was the view of the Court of Appeals that Hanover claims as error and that United defends as its second position, Un. Br. No. 335, 12-13].

United has pointed to nothing in the language of the final decree itself to support either of its claims. Hanover submits that this should end the matter. If the Court that entered the decree fixed no limits to its effect and operation, past or future, the treble damage court should apply it as its language adjudicates. Judge Sheridan below was correct in looking first to the language of the final decree. He concluded that "Judge Wyzanski did not attempt to limit his decree to the future" (A. 48) 245

* *United States* v. *United Shoe Machinery Corporation,* 110 F. Supp. 295 (D. Mass. 1953) *aff'd per curiam,* 347 U. S. 521 (1954).

F. Supp. at 272.* The Court of Appeals agreed on this point (A. 203-204) 377 F. 2d at 787.

Contrary to United's suggestion, Un. Br. No. 335, 13, Hanover is not in disagreement with the conclusions of Judge Sheridan. Neither does Hanover have any quarrel with the District Court in the Government case. Rather, it relies on that court's decree as prima facie evidence of monopolization. In short, Hanover has no fault to find with any "holding" of either of those courts. We claim error in the decision of the Court of Appeals. United is correct about that.

The fault we find with the decision of the Court of Appeals is that, based on a misreading of the prior decisions involving United and an erroneous view of the applicable law, it holds that Hanover is not entitled to damages prior to the *American Tobacco* decision by this Court. We argue this point in Han. Br. No. 335, 24-41. In this brief we will reply only to erroneous and misleading points in United's answering brief.

Under heading B, Un. Br. No. 335, 13-25, United does not overcome Hanover's argument by quoting selected bits from Judge Wyzanski's opinion in the Government case, Un. Br. No. 335, 13-14. The only way to correct United's statements is to put these excerpts in their proper context.

The statement of the District Court in the Government case that "United's power does not rest on predatory practices" Un. Br. No. 335, 14, was part of the conclusion that it was irrelevant that United's policies were not immoral and that "the violation with which United is now charged depends not on moral considerations, but on solely economic considerations," 110 F. Supp. at 345. Judge Wyzanski had, a few paragraphs ahead of this, held that United's market control rested on "barriers to competition

* Hanover develops this point in its brief in No. 463, 21-23. See also *id.*, 16-21.

* * * erected by United's own business policies," notably "its system of leasing, and not selling its more important machines," *id.* at 344. There is no dispute about any of this.

The next bit quoted by United, Un. Br. No. 335, 14, is that until Alcoa lost its case in 1945, United had "no significant reason to suppose" that it had been violating Section 2. Again, Judge Wyzanski was using this to show that the officers of United had no "moral deficiency." In this context it was his view that trial judges should not proceed with "surgical ruthlessness" in applying the remedy of dissolution, 110 F. Supp. at 348. The bit quoted by United in no way qualifies the adjudication of illegality based on monopolization and exclusionary policies and practices.

Next, United cites the *Steel, Harvester* and *Swift* decisions,* Un. Br. No. 335, 15-17, in its attempt to show that United, which was found not to have engaged in "predatory practices," was, therefore, untouchable under earlier decisions, *id.* at 15-20. United is merely diverting attention from the holding in the Government case of its monopolistic position and its exclusionary lease-only practices when it seeks to put itself apart from earlier antitrust violators.

Hanover does not claim that United's monopolization had been accomplished through the sort of "predatory practices" fashionable in bygone years. It was accomplished in other ways, as was held in the Government case. United's brief reads as though United had won the Government case because the Court in that case found that it had not engaged in "predatory practices." It seems to be

* *United States* v. *United States Steel Corp.*, 251 U. S. 417 (1920); *United States* v. *International Harvester Co.*, 274 U. S. 693 (1927); *United States* v. *Swift & Co.*, 286 U. S. 106 (1932).

worth noting that it lost that case. Hanover's case rests on monopolization by United of 89% to 100% of the twenty shoe machine types used by Hanover, which accounted for 80 percent of the charges Hanover paid United, and of 85% to 100% of all but six of the machine types Hanover leased from United (A. 34-35) 245 F. Supp. at 265-266, and on United's exclusionary lease-only policy and practices.

United cites, Un. Br. No. 335, 17, two lower court decisions in 1915 and 1916 to support its claim that until *Alcoa** in 1945 unlawful or predatory acts were an essential element of monopolization by a single firm. United at this point ignores the decision in 1911 in *United States v. Patten,* 187 Fed. 664 (S.D.N.Y.) cited in Han. Br. No. 335, 29. This Court quoted an excerpt from the opinion in that case with evident approval in *American Tobacco Co.* v. *United States,* 328 U. S. 781 at 811.** Hanover submits that the *Patten* case, which this Court obviously did not consider strange or novel, is far more significant than whatever support United thinks it can find in the two lower court decisions cited by it.

However, it is hard to find any support in *United States* v. *American Can Co.,* 230 Fed. 859 (D. Md. 1916), 234 Fed. 1019 (D. Md. 1916), because there the District Court declared that a decree would be entered "* * *adjudging that while the defendant was organized to monopolize interstate trade in cans, and to attain that object such

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* *United States v. Aluminum Co. of America,* 148 F. 2d 416 (2d Cir.).

** This Court quoted the *Patten* excerpt in support of its statement that, "The authorities support the view that the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so," 328 U. S. 781 at 811.

trade was unlawfully restrained by it * * *" the court would not at that time decree dissolution. This decision was reached "* * * without prejudice to a renewal of such demand * * * if it shall hereafter be made to appear to the court * * * that the size and power of the defendant * * * are being used to the injury of the public, or whenever such size and power * * * have given to the defendant a dominance or control over the industry * * * so great as to make dissolution * * * expedient." 234 Fed. at 1022. The United States was evidently content with this decree and dismissed its appeal, 256 U. S. 706 (1921). The District Court that entered this decree made no mention of any need for a showing of "predatory practices" as an essential element of monopolization, in addition to "size and power." The language quoted above is to the contrary. It is enough if trade is "unlawfully restrained." The exclusionary lease-only practices of United, together with its size, were the basis of the monpolization found in the Government case. United can scarcely be heard to claim that its exclusionary practices were lawful.

The other lower court decision relied on by United, *United States* v. *Keystone Watch Case Co.*, 218 Fed. 502 (E.D. Pa. 1915) is another case in which the District Court, in issuing an injunction directed against antitrust violations, retained jurisdiction with leave to the United States to ask for additional relief "* * * even to the point of breaking up the defendant corporation," *id.* at 519. Again, the United States was understandably content and dismissed its appeal, 257 U. S. 664 (1921). United's brief quotation, Un. Br. No. 335, 17, from the 1915 opinion of the District Court is incomplete but we see no relevance in the elaboration of the views of that District Court, though it should be noted that its recital of modes of violation

is ample enough to include United's exclusionary practices, and that the court left room for later consideration of "other methods of unreasonably restraining trade" that might be developed "* * * in the complexity of human affairs," *id.* at 518.

It took no signal from commentators on *Alcoa,* Un. Br. No. 335, 17-19, to put any company in United's position on full notice of the law on the statute books and of its interpretation by the courts long before *Alcoa* and *American Tobacco,* see Han. Br. No. 335, 27-31.

United next asserts that it had an "assured record of judicial approval" of its leasing policy, Un. Br. No. 335, 20.

In support it first quotes, Un. Br. No. 335, 20-22, bits from the sixty-five pages of opinions of the three judges of the Massachusetts District Court in the civil action brought contemporaneously with the criminal indictment whose dismissal was affirmed in *United States* v. *Winslow,* 227 U. S. 202 (1913). This court on the appeal of the civil case upheld the validity of the clauses in the leases as exercises of United's position as holder of patents covering the machinery, 247 U. S. 32, 56-65 (1918).* The encomiums of the District Court judges on United's leases over fifty years ago have no importance to any issue before this Court in Hanover's case.

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* "To the attacks of the Government the defendants reply that the leases are the exercise of their right as patentees and if there is monopoly in them it is the monopoly of the right," 247 U. S. at 56. Again in 1922 this Court reiterated its view that the 1918 case merely sustained the leases "as valid and binding agreements within the rights of holders of patents." *United Shoe Mach. Corp.* v. *United States,* 258 U. S. 451, 460. And this Court reaffirmed that view of the case in *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 412 and n. 10 (1945).

In spite of these encomiums, so fulsomely quoted, United makes the limited claim that only the full-capacity clause in its leases was approved, Un. Br. No. 335, 22, in that litigation. United must know, as stated in Han. Br. No. 335, 4, that all clauses under attack were sustained as exercises of United's power as holder of patents on the machinery, 247 U. S. 32, 56-65. This was United's contention, 247 U. S. 32, 56.

Again, concentrating only on the full-capacity clause, United states that this clause survived scrutiny when the United States later proceeded against United's leases under the newly enacted Clayton Act, Un. Br. No. 335, 22-23. This survival, however, was only in the District Court and only on scrutiny of the clause as such and without regard to the manner in which it had been exercised.* This is the only comfort United can find in this, its third encounter with the United States, because the United States prevailed with respect to all other clauses under attack and an injunction issued, 258 U. S. 451 (1922). And even the full capacity clause was stricken in the Government case when proof showed how it had been exercised.**

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* The issue of the validity of this and other restrictive clauses in United's leases was first presented on motion to dismiss the Government's complaint under the Clayton Act. The motion was denied, *United States* v. *United Shoe Machinery Corp.*, 234 Fed. 127 (E.D. Mo. 1916). United quotes, Un. Br. No. 335, 22-23, the opinion of the District Court dealing with the full capacity clause and the excess machinery clause, 234 Fed. at 151 and see also exhibits 2 and 7, *id.* at 131, 132. After trial the District Court enjoined use of eight clauses but again sustained the validity of the full capacity clause, *United States* v. *United Shoe Machinery Corp.*, 264 Fed. 138 (E.D. Mo. 1920) in reliance on its prior opinion on the motion to dismiss, 264 Fed. at 167. The United States dismissed its appeal from this part of the decision of the District Court, 254 U. S. 666 (1921). Defendant United appealed from the decision invalidating eight other clauses in its leases and this Court affirmed in 258 U. S. 451 (1922).

** *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 320-321 and Final Decree pars. 4 and 6e, *id.* at 352.

United draws the fantastic conclusion from its recital as to the survival of its full capacity clause before the District Court in 1920 that this gave to it assurance of compliance with the law as to its "current leasing practices," Un. Br. No. 335, 23. Such a conclusion is absurd.

Next, United seeks support in the brief reference to United at the end of the dissenting opinion of Mr. Justice Brandeis in *American Column & Lumber Co.*, v. *United States,* 257 U. S. 377, 419 (1921), Un. Br. No. 335, 23. Mr. Justice Brandeis there pointed to United Shoe Machinery Corporation and United States Steel Corporation as examples of "the inviting field of consolidation" by way of warning that the decision of the Court might lead the independent hardwood lumber companies involved to that device with, as he stated, the result of creating "another huge trust," 257 U. S. at 419.

United next, Un. Br. No. 335, 24, criticizes Hanover's citation of *Straus* v. *Victor Talking Machine Co.,* 297 Fed. 791 (2d Cir. 1924) for the point that evidence of reliance on decisions of this Court is of no avail in a treble damage action. In that case we pointed out that defendant *Victor* had patterned a new marketing plan upon the decision of this Court in *Bauer & Cie* v. *O'Donnell,* 229 U. S. 1 (1913) and had put this forward as a defense when the plan was attacked in a treble damage action. United asserts that *Bauer & Cie* v. *O'Donnell* "did not approve the program for control by the patentee of resale prices of the article patented," Un. Br. No. 335, 24. Of course, it did not, but *Victor* nonetheless relied upon that decision as well as on *Henry* v. *A. B. Dick Co.,* 224 U. S. 1 (1912). This reliance

was explicit.* In fact, *Victor* pleaded as a separate defense its reliance on the *Dick* case, later overruled, as support for the new distributing plan and, in words reminiscent of United's plea here, urged that it would be "most unjust * * * to hold this defendant guilty of wrongful and inequitable conduct when, in fact, its conduct was in accordance with the law of the land, and would cause this defendant great and irreparable damage * * * and that subsequent decisions cannot retroactively make unlawful acts and conduct theretofore lawful under the law of the land."** This plea, as we stated, was to no avail. It had no legal significance.

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* See Plaintiff's Exhibit 6, announcement dated August 1, 1913 from Victor to dealers, R. Vol. IX, pp. 4749-51 in *Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791 (2d Cir. 1924), reading in part as follows:

> "To Victor Dealers:—
>
> Since the decision of the Supreme Court of the United States in the Henry-Dick case, otherwise known as the Mimeograph case, it became apparent to the Victor Co. that a more advantageous system of putting out its goods could be adopted as to certain features, than that theretofore employed by it in selling its goods to the Trade, and to the public. We had been working on this new plan in a somewhat leisurely fashion until the decision of the Supreme Court in the recent Sanatogen case (Bauer Chemical Co. *vs.* O'Donnell) and since this latter decision we have determined to adopt now our new system of licensing our patented goods for use only." *See also* 297 Fed. 791, 794.

In an earlier action brought by Victor against Straus for patent infringement prior to Straus's treble damage action, Victor advanced the identical argument, claiming that its marketing plan was based on *Bauer & Cie* v. *O'Donnell,* but this Court gave short shrift to it:

> "It would be a perversion of terms to call the transaction intended to be embodied in this system of marketing plaintiff's machines a 'license to use the invention.' *Bauer & Cie* v. *O'Donnell,* 229 U. S. 1, 16." *Straus* v. *Victor Talking Machine Co.,* 243 U. S. 490, 501 (1917).

** Order dated January 17, 1921 and Second Amended Answer of Defendant Victor Talking Machine Co. R. Vol. I, pp. 277-281, in *Straus* v. *Victor Talking Machine Co.* 297 Fed. 791 (2d Cir. 1924).

Finally, United is critical, Un. Br. No. 335, 24-25, of Hanover's reference to Judge Hand's citation in *Alcoa* of four decisions of this Court.* United correctly states that all four were cases of combinations. But Judge Hand did not find this distinction relevant. For purposes of defining the offense of monopolization, Judge Hand was convinced in 1945, on the basis of the law as he knew it, that "it can make no difference whether an existing competition is put an end to, or whether prospective competition is prevented," 148 F. 2d 416, 429. That is Judge Hand's reasoning and it is applicable here.

The Government case here is an exact duplicate of *Alcoa* on this point. In the Government case, as in *Alcoa*, the monopolization rests on exclusionary practices. Here it is the lease-only policy and practices. In *Alcoa* the recital of events is different but the effect was the same, 148 F. 2d 416, 430-431. These are the "abuses" in both cases. These are in the category of the "abuses" that Justice Cardozo referred to in *United States* v. *Swift & Co.*, 286 U. S. 106, 116 (1932), quoted in Han. Br. No. 335, 30. This is no "play on words" as United argues, Un. Br. No. 335, 24. This is the stuff out of which antitrust cases are made. United's exclusionary lease-only policy and practices were found to have been violative of Section 2 of the Sherman Act. There can be no doubt about that. They are no less illegal though the leaders of United who carried on the monopolization for so many years had no "moral deficiency."** Their acts were illegal and that is enough for Hanover's case.

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* *United States* v. *Union Pacific R.R.*, 226 U. S. 61 (1912); *United States* v. *International Harvester Co.*, 274 U. S. 693 (1927); *United States* v. *Reading Co.*, 253 U. S. 26 (1920); *United States* v. *Southern Pacific Co.*, 259 U. S. 214 (1922).

** *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 348.

Under heading C, Un. Br. No. 335, 25-26, United persists in making extravagant and incorrect statements about the decisions of this Court.

Heading C itself refers to "The 1918 case* in which this Court upheld United's lease-only policy * * *" No such issue was before this Court in that case. In the text, Un. Br. No. 335, 25, the statement is the same, that this Court "* * * upheld United's lease-only policy." The emphasis is a little different when the reference is to "* * * this Court's holding that its lease-only policy was permissible," Un. Br. No. 335, 26. Again, no such issue was before this Court.

United quarrels with our statement of the basis of the decision of this Court in the 1918 case, Un. Br. No. 335, 25. Hanover's position is stated in Han. Br. No. 335, 34, where we point out our reliance upon the statement of this Court in the 1922 decision as to the basis of the decision in the 1918 case. United's contention before this Court in the 1918 case rested on its patent position. This Court stated: "To the attacks of the Government the defendants reply that the leases are the exercise of their right as patentees and if there is monopoly in them it is the monopoly of the right," 247 U. S. at 56. That is what United contended then. This Court correctly described the decision as resting on that basis. See Han. Br. No. 335, at 33-37 and Han. Br. No. 463, at 37-39.

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* *United States* v. *United Shoe Machinery Corporation*, 247 U. S. 32 (1918).

III.

Reply to United's arguments as to Hanover's requests for relief, Un. Br. No. 335, 26-29.

United is in error in stating in heading 3, Un. Br. No. 335, 26, that Hanover's requests for relief, Han. Br. No. 335, 41-42, attempted to raise issues not properly before this Court.

A. As to the ORL machine, Un. Br. No. 335, 27-28.

Hanover presents no issue as to this machine that calls for a decision of this Court. Hanover asks only that the mandate of the Court of Appeals be carried out as to an issue that is not before this Court on either Hanover's petition in No. 335 or United's petition in No. 463.

The situation is that Hanover had cross-appealed to the Court of Appeals from so much of the judgment of the District Court as had disallowed damages as to one United machine, the so-called ORL. The Court of Appeals in its decision (A. 215-216) 377 F. 2d 776, 793, declined to pass on Hanover's claim on the record before it and stated that since its decision required a remand for retrial on the damage issue due to the shortened damage period and deduction of taxes, "The issue [as to the ORL] therefore must be remitted to the court below for reconsideration as part of the retrial on damages. When evidence has been taken on this question on retrial the record may well be different from what is now before us." (A. 216) 377 F. 2d 776, 793.

Hanover asks that the mandate of the Court of Appeals be carried out in so far as it relates to Hanover's cross-

appeal below (A. 226).* It is hard for us to understand why it makes any difference whether the hearing before the District Court is "part of the retrial of damages" or not. If Hanover prevails before this Court in No. 335, there will be no need for a retrial of damages but there will still be a need, under the mandate of the Court of Appeals, for a reconsideration by the District Court of the ORL matter. Hanover asks that this mandate be carried out. There must in any event be a recalculation of damages by the District Court because of the shortening of the damage period from September 21, 1955 to June 1, 1955, Han. Br. No. 335, p. 6, fn.; see request No. 2(b), *infra* at 24.

United quarrels, Un. Br. No. 335, 27-28, with a claimed inconsistency between Hanover's request No. 2, Han. Br. No. 335, 41, that the Court of Appeals be directed to affirm the judgment of the District Court and request No. 3, *id.* at 42, that the amended judgment of the Court of Appeals be affirmed in so far as it ordered reconsideration of the ORL point on Hanover's cross-appeal, No. 15,627 before the Court of Appeals. If Hanover's requests present any problem, Hanover asks that request No. 2 be subject to its request No. 3, Han. Br. 41-42.

B. As to attorneys' fees, Un. Br. No. 335, 28.

United claims that Hanover in its request No. 1(b), Han. Br. No. 335, 41, is attempting to deprive the Court of Appeals of the opportunity to pass on the reasonableness of the awards. This is not so. The District Court's

* The amended judgment of the Court of Appeals on this point is that, "in Hanover's appeal (No. 15,627) the judgment of the District Court, filed August 13, 1965, be, and the same is hereby vacated so that the issue therein raised may be reconsidered as part of the retrial of damages." (A. 226)

allowance was attacked by United before the Court of Appeals, the issue was briefed and argued before that Court and in its decision that Court found no fault with the District Court's allowances and vacated the awards only for reconsideration in view of the need it felt for a retrial as to damages. If Hanover prevails before this Court, there will be no need for a retrial of damages and, therefore, no need for further proceedings as to the allowance of attorneys' fees. There will only be need for a recalculation of damages to eliminate the last three months and twenty-one days, see *infra* at 23-24.

Hanover has presented no issue to this Court on this point and neither has United. The District Court went into this matter with meticulous care (A. 166-173) 245 F. Supp. 258, 302-305. The action of the Court of Appeals was to note that one item entering into the consideration of this matter by the District Court was "the percentage of the recovery in its original and trebled amounts" (A. 217) 377 F. 2d at 793, and that there might be "a new award" following retrial on damages. Apart from this one point, the Court of Appeals found no fault with the award of the District Court.

United is asking for a third round of briefs and argument as to attorneys' fees. The matter has already been briefed and argued once before the District Court and once before the Court of Appeals. United failed in its first attempt to persuade the Court of Appeals that it should upset the District Court. There is no reason why it should have another chance in the same court.

C. As to "Other Damage Issues," Un. Br. No. 335, 29.

In this curious paragraph United argues that Hanover's request that the judgment of the District Court be

affirmed would deprive the Court of Appeals of the opportunity to resolve "other damage issues" raised by United. This supposes that there were questions left open by the Court of Appeals, other than the two on which a remand was ordered.* There are none. United misconstrues what the Court of Appeals said when it argues that the Court of Appeals found it not possible to adjudicate "• • • on the present record," Un. Br. No. 335, 29, important questions raised by United as to Hanover's damage calculations. This is simply not so.**

United has had its day in Court on Hanover's theory of damage and it lost in both courts below. It has presented only one issue before this Court in No. 463 with respect to "the validity of Hanover's damage calculations" Un. Br. No. 335, 29, and that is the item of "cost of capital." That is the only item in Hanover's damage calculations and in its theory of damage that United attacks. Both courts below held against United.

D. As to "Hanover's attempt to avoid retrial," Un. Br. No. 335, 29.

In a final paragraph United calls attention to the fact that the Court of Appeals disallowed damages to Hanover for the period of June 1, 1955 to September 21, 1955 (A. 212) 377 F. 2d at 791 and that, therefore, Hanover is in error in its request for relief that the judgment of the

* These, of course, are the two questions presented in No. 335.

** The paragraph in which these quoted words occur shows that the Court of Appeals said precisely the opposite:

> "A number of problems in the proof of damages which have been presented to us will recur on retrial. To the extent that it is possible to adjudicate them on the present record, it is desirable that we do so as a guide to the court below on the retrial," (A. 212) 377 F. 2d at 791.

The Court then proceeded to dispose of them, (A. 212-215) 377 F. 2d at 791-793.

District Court be affirmed, relief par. 2, Han. Br. No. 335, 41. In preparing its petition to this Court Hanover determined not to present this trifling point. In fact, the elimination of the last three months and twenty-one days from the damage calculations presents no need for "a second trial of the damage issue" as United argues, Un. Br. No. 335, 29. The need is only to eliminate these days from the total. Hanover now revises its prayer for relief to take account of this point.

Conclusion

Hanover's request for relief, Han. Br. No. 335, 41-42, and also Han. Br. No. 463, 62-63, are modified so that:

Request No. 2 is modified to read as follows:

2. The Court of Appeals be directed to affirm the judgment of the District Court dated August 13, 1965 subject only to

a. the reconsideration by the District Court of the disallowance of damages by the District Court as to United's ORL machine; and

b. the elimination from the damage calculations of the period between June 1, 1955 and September 21, 1955.

Respectfully submitted,

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